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In the
SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

and

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,

Petitioners,

v.

GULF POWER COMPANY, *et al.*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

Brief of Real Access Alliance as *Amici Curiae* in Support of Respondents

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QUESTION PRESENTED

The Real Access Alliance addresses the second of the two issues before this Court, as stated by Respondents American Electric Power Service Corporation, *et al.*, which is:

Whether 47 U.S.C. § 224 grants the Federal Communications Commission jurisdiction to regulate attachments of wireless telecommunications equipment.

PARTIES TO THE PROCEEDING

The Petitioners before the Court in this proceeding are the United States of America, the Federal Communications Commission, and the National Cable Television Association.

The Respondents before the Court in this proceeding include Alabama Power Company, American Electric Power Service Corporation, Ameritech Corporation, Atlantic City Electric Company, BellSouth Corporation, Cable Television Association of Arizona, Commonwealth Edison Company, Comptel, Delmarva Power & Light Company, Duke Energy Corporation, Florida Power & Light Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Public Service Electric & Gas Company, Qwest, Savannah Electric Power Company, Sprint, Tampa Electric Company, TXU Electric Company, Union Electric Company, United States Telecom Association, United Telecom Council, Virginia Electric & Power Company, and Worldcom, Inc.

Additional parties appeared before the U.S. Court of Appeals for the Eleventh Circuit but are no longer participating in this matter.

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PRELIMINARY STATEMENT

The Real Access Alliance (the "Alliance" or the "Real Estate *Amici*") respectfully submits this brief pursuant to Rule 37 of the Court's Rules, as *amici curiae* in support of the Respondents in this proceeding.[1]

The Real Estate *Amici* submit this brief in support of affirmance because the grounds for reversal -- particularly the factual and policy arguments -- presented by the Federal Petitioners and the Wireless *Amici* in their briefs to this Court depend on an interpretation of Section 224 that was neither briefed before the Court of Appeals, nor relied on by the agency in its decision. The Federal Petitioners and Wireless *Amici* assume that Section 224 applies not only to poles and other outdoor facilities, but to pathways inside buildings. That interpretation, however, was first adopted by the Federal Communications Commission (the "Commission") in a collateral proceeding only after the opinion of the Court of Appeals had issued, and a petition for reconsideration of that Commission decision is pending before the agency. Accordingly, the briefs of the Federal Petitioners and the Wireless *Amici* raise a potential question under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943): this Court will not sustain an agency decision on a ground that was not relied on in

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[1] Pursuant to Rule 37.6, the Real Access Alliance and its counsel certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Real Access Alliance and its members made any monetary contributions to the preparation of this brief. Further, pursuant to Rule 37.3(a), this brief is being filed with copies of the written consent of all the parties.

the agency decision itself. The decision of the Court of Appeals should also be affirmed because any decision based on the interpretation urged by the Federal Petitioners and the Wireless *Amici* would implicate the Fifth Amendment property rights of every building owner in the country.

INTEREST OF THE REAL ESTATE *AMICI*

The Alliance is a coalition of eleven trade associations representing approximately one million members engaged in all aspects of the real estate industry. The Alliance was formed to encourage free market competition among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America's real estate owners. Cable operators, wireless and wireline telecommunications providers, and public utilities, including electric power companies, all require access to commercial and residential multi-tenant buildings to serve their customers. Accordingly, the scope and application of the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (1978) (codified as amended at 47 U.S.C. § 224), is a matter of fundamental concern to the real estate industry.

As noted above, there is another proceeding now pending before the Commission that concerns an interpretation of Section 224 that was advanced in the briefs of Federal Petitioners and the Wireless *Amici*. That interpretation raises legal and Constitutional issues that have not been briefed in this case at any

stage. A reversal of the decision of the Court of Appeals could adversely affect property owners by inadvertently endorsing a broader interpretation of Section 224 than Congress intended. The Real Estate *Amici* hope to forestall such an unintentional and potentially unconstitutional effect by providing the Court with a more complete context for its decision.

The real estate industry contributes over eleven percent of the nation's Gross Domestic Product. *Industry Accounts Data, Gross Domestic Product by Industry* United States Department of Commerce, Bureau of Economic Analysis, (1995) (http://www.bea.doc.gov//bea/du2/gposhr.htm). The description of each of the Alliance's members in the Appendix illustrates the magnitude of the interests that might be affected by this case.

COUNTERSTATEMENT OF THE CASE

The Real Estate *Amici* adopt the Counterstatement of the Case set out in the brief of Respondents American Electric Power Service Corporation ("AEPSC"), *et al.* In their brief, AEPSC, *et al.*, mention that in the Commission's *Competitive Networks* proceeding,[2] certain wireless companies have argued that Section 224 grants them access to pathways inside

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[2] *See Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673 (1999) (the "*Competitive Networks NPRM*").

buildings for their facilities. AEPSC Brief at pp. 31-32, n.23. The Real Estate *Amici* wish to supplement AEPSC's Counterstatement of the Case by describing more precisely the importance, history and relevance of that proceeding and that issue.

The passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), created a new environment for the telecommunications industry. Long dominated by monopoly providers, and hence highly regulated, the industry was to be deregulated in an effort to promote an industry-wide restructuring that would in turn introduce all the benefits of the competitive marketplace to the industry. Given the complexity of the new legislation and the attendant issues, it was not surprising that the Commission should soon embark on dozens of rulemaking proceedings in an effort to implement the will of Congress.

What was surprising, however, was that the real estate industry quickly found itself swept into the Commission's regulatory maelstrom. Within a few months of the passage of the 1996 Act, at least five separate Commission proceedings were underway that threatened the interests of property owners, even though the 1996 Act nowhere directs the Commission to regulate the real estate industry.[3] In fact, Congress

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[3] *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809 (1996); *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, Notice of Proposed Rulemaking, 11 FCC Rcd 6357 (1996) (later combined with Docket No. 95-59); *Implementation of the*

had earlier specifically considered and rejected legislation that would have forced property owners to grant telecommunications providers physical access to their buildings.[4]

In one form or another, all of these proceedings raised the possibility that the Commission would force

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Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171 (1996); *Telecommunications Services Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996) (later combined with Docket No. 95-184). The same issues also arose later, in comments submitted in *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Said Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd 15280 (1998).

[4] S. 1822, 103rd Cong., § 302 (1994). This bill, although never enacted, was one of the predecessors of the 1996 Act and proposed broad reform of the communications industry. As reported out of committee, the bill would have added Section 230(j) to the Communications Act, which would have stated "[n]o person owning, leasing, controlling or managing a multi-unit building shall forbid or unreasonably restrict any occupant, tenant, or lessee of such building from receiving telecommunications services from any provider of its choice. ..." Neither this provision nor anything comparable appear in the 1996 Act.

property owners to permit the installation of communications equipment on their property, over their objections. In each case, various parties sought to obtain the right to install communications equipment of various kinds -- including cable television wiring, telephone wiring, direct broadcast satellite dishes, and other types of antennas -- in or on the property of third parties. Recognizing that it was treading on new and dangerous ground, the Commission either rejected these approaches or delayed a decision by seeking additional comment. *See, e.g., Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 at ¶¶ 59-61, 178 (1997).

Various legal theories and policy justifications were presented to support the requested regulations, but in a 1996 Petition for Reconsideration of the First Report and Order in the Commission's Local Competition proceeding, CC Docket No. 96-98, the wireless industry first advanced the notion that Congress intended Section 224 to apply to "poles," "ducts," "conduits" and "rights-of-way" *inside* privately-owned buildings. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Winstar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996).

In 1999, previous efforts to establish a forced access regime having failed, this new interpretation of Section 224 was incorporated into a broader effort to convince the Commission to require building owners -- primarily owners of commercial office buildings -- to

grant them the right to install facilities inside buildings on favorable terms.[5]

In the interim, the Commission had initiated and completed the rulemaking that led to this case. The real estate industry did not participate in that proceeding, because it did not appear to implicate the industry's interests.[6] The order reviewed by the Court of Appeals also did not address access to buildings in any way, nor had any prior interpretation of Section 224. *See Implementation of Section 703(e) of the Telecom-*

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[5] A group of competitive carriers headed by several wireless companies met with Commission staff in May 1999 and presented a white paper setting forth various legal theories for forced building access. *See Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Comments of the Association for Local Telecommunications Service (filed Aug. 27, 1999). The rationale underpinning these demands has been the incorrect allegation that property owners have market power and can therefore impose unreasonable terms on competitive carriers. The competitive carriers have complained that building owners have granted access to the incumbent carriers without requiring them to sign license agreements or pay fees for the right to install facilities in a building. They have also complained that it takes too long for them to gain access to buildings.

[6] *See Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Notice of Proposed Rulemaking, 12 FCC Rcd 11725 (1997) (the "*Pole Attachments NPRM*"). To this extent, the agency's notice of proposed rulemaking did not give notice of the interpretation of Section 224 first briefed in this Court. *See* 5 U.S.C. § 553.

munications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments. Report and Order, 13 FCC Rcd 6777 (1998) (the "*Pole Attachments Order*").

In any event, ignoring the irony of regulating the real estate industry in the course of deregulating the telecommunications industry, the Commission responded to the wireless industry's request by issuing a Notice of Proposed Rulemaking in June 1999, seeking comments on whether the Commission should grant telecommunications providers access to private property over the objections of the owner. *Competitive Networks NPRM*, 14 FCC Rcd 12673 (1999). The Commission proposed several theories for such regulation, including the theory that Section 224 applies to pathways and facilities inside buildings, even if the owner of the building is not a utility. *Id.* at ¶¶ 39-48. In response, the Alliance submitted thorough and detailed analyses of the Constitutional, legal and factual issues surrounding access to private property by telecommunications providers.[7] In these comments, as in many prior submissions to the Commission, the Alliance conclusively demonstrated that regulation is unnecessary because the market is in fact working. The Alliance also demonstrated that forced access regula-

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[7] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Joint Comments of the Real Access Alliance (filed Aug. 27, 1999); Joint Reply Comments of the Real Access Alliance (filed Sep. 27, 1999); Further Comments of the Real Access Alliance (filed Jan. 22, 2001); Further Reply Comments of the Real Access Alliance (filed Feb. 21, 2001).

tions would be impractical, unconstitutional, and beyond the Commission's authority.

Among the thousands of pages of materials that the Alliance has provided the Commission are the following:

- A statistically-valid survey conducted by an independent research firm showing that property owners rarely refuse access to competitive providers, primarily because they wish to respond to the needs of their tenants.
- An economic study showing that the real estate industry is a competitive market and that local competition in the office telecommunications market is thriving.
- A survey of building owners, managers, and tenants showing that 80% of office buildings have more than one telecommunications provider, and almost 60% are served by at least three providers.
- A second statistically-valid survey conducted by an independent firm showing that 98% of commercial tenants have never been denied service by the telecommunications provider of their choice as a consequence of the actions of their landlords. In addition, 94% of respondents stated that they had no telecommunications needs that were not being met at their current location.
- Information from various sources, including the Commission and competitive providers, regarding the dramatic rate of growth in the

competitive telecommunications industry since 1996.[8]

In addition, the Alliance presented to the Commission voluntary best practices guidelines for property owners, designed to increase the speed with which requests for access to buildings are processed.[9] These commitments were a key reason that the Commission decided to defer direct regulation of the real estate industry when it issued the First Report and Order in the *Competitive Networks* proceeding in October 2000. 15 FCC Rcd 22983 at ¶ 126 (2000) (the "*Competitive Networks Order*").

Notwithstanding the Commission's decision not to regulate the real estate industry directly, the October 2000 *Competitive Networks Order* formally adopted the position that Section 224 applies to telecommuni-

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[8] Despite the recent problems the telecommunications industry has faced in the capital markets, the Commission recently released a report stating that local competition nearly doubled in 2000. *Local Telephone Competition: Status as of December 31, 2000,* Industry Analysis Division Common Carrier Bureau, Federal Communications Commission, at 1 (May 2001). (Competitors now serve 8.5% of the local telephone market).

[9] *See Promotion of Competitive Networks*, WT Docket No. 99-217, *ex parte* letter of the Real Access Alliance (filed Sep. 6, 2000). As part of this effort, the Alliance has prepared a model telecommunications license agreement to simplify and speed transactions between office building owners and telecommunications providers. This document has been submitted to the Commission and was released publicly on May 22, 2001. "Office Tenants to Benefit from Landmark Telecom Model License Agreement," http://www.realaccess.org/press052201.htm.

cations pathways inside buildings. 15 FCC Rcd 22983 at ¶ 82. The Commission ruled that if a "utility" for purposes of Section 224 owns or controls poles, ducts, conduits, or rights-of-way inside a building owned by a third party, the utility must grant access to a cable operator or telecommunications provider that requests it. *Id.* at ¶ 85. In an effort to avoid the threat of a taking of private property under the Fifth Amendment, the *Competitive Networks Order* apparently applies only in cases in which the building owner has in some fashion consented to the presence of the attaching party in the building. Nevertheless, the *Competitive Networks Order* is sufficiently ambiguous that the Commission may not have succeeded in that effort, and the Alliance filed a timely Petition for Reconsideration with the Commission on February 12, 2001. The *Competitive Networks Order* also holds open the possibility of imposing future forced access regulations on the real estate industry by further extending the Commission's interpretation of Section 224.[10] The Commission's new interpretation of Section 224 therefore raises a substantial risk that in the name of tele-

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[10] The Massachusetts Department of Telecommunications and Energy ("DTE") recently adopted a forced access rule, relying on its interpretation of the Massachusetts state law parallel to Section 224. 220 CMR §§45.00-45.11 (Aug. 18, 2000). This statute, M.G.L. c. 166, §25A, includes a broad definition of "utility" that the DTE argues includes building owners. The DTE decision is now under appeal. *Greater Boston Real Estate Board, et al. v. Massachusetts Dep't of Telecommunications and Energy,* No. 00-4909-A, filed Nov. 3, 2000 (Mass. Sup. Ct.). The appeal was argued in Suffolk County on May 31, 2001.

communications competition the Commission will regulate an entire new industry without a word of authorization from Congress.

In the *Competitive Networks Order*, the Commission also asked for further information regarding the current state of the market and authorized the Wireless Telecommunications Bureau to request further information on that topic after an eight-month hiatus. The Commission also requested comments regarding several legal issues. These include whether the Commission may regulate the real estate industry indirectly, such as by forbidding telecommunications providers from providing service to subscribers in buildings whose owners do not conform to certain nondiscrimination standards; and whether Section 224 applies not only to defined pathways inside buildings, but to any space in or on a building.

Furthermore, even though the issue of whether Section 224 applies inside buildings has not yet come to rest at the agency level, the Federal Petitioners and the Wireless *Amici* seek to raise the issue here for the first time in this appeal.

In sum, Section 224, which was originally drafted and enacted in an effort to help the cable industry obtain access to wireline facilities, is now being cited in a surreptitious attempt to give wireless telecommunications providers access to privately-owned buildings. Nothing in the express language of the statute, the legislative history, or the history of the order under review justifies such an interpretation.

SUMMARY OF ARGUMENT

The Real Estate *Amici* urge the Court to affirm the decision of the Court of Appeals because its strict reading of Section 224 conforms to the intent of Congress. The Commission has no inherent authority to regulate entities that are not engaged in some facet of the communications business. Consequently, when Congress saw a need for regulating the terms of cable television attachments to poles and other facilities owned by electric utilities, it elected to expand the Commission's authority only in the most limited fashion. Section 224 must be read strictly to prevent the Commission from exceeding this narrow authority. In particular, the Court should avoid any reading of Section 224 that would extend its application to pathways inside buildings. Such an interpretation would present the possibility of a taking of private property, is not properly before this Court, and is still under review by the Commission.

The express purpose of Section 224 was to permit the attachment of wires and associated equipment; the statute contains no reference to wireless equipment, and the 1996 amendments to the statute did not alter any of the pertinent language. Furthermore, the policy underlying Section 224 was to protect operators of wireline facilities from unjust practices related to their use of facilities necessary for the economical construction of new wireline networks. The Court of Appeals was therefore correct in reading the statute to preclude Commission regulation of attachments of wireless equipment.

Finally, the Federal Petitioners and the Wireless *Amici* would have the Court indirectly resolve a matter that was not addressed in the Commission's rulemaking or the decision of the Court of Appeals. They assert that the Court of Appeals concluded that wireless equipment does not qualify for the benefits of Section 224 because it failed to understand that some wireless providers do not use poles, towers and similar structures, but must have access to specific buildings to reach their customers. In fact, however, the *Pole Attachments Order* indicates that the Commission was concerned with mobile wireless providers and did not consider the siting needs of fixed wireless operators. The Court of Appeals was entitled to rely on the examples and issues discussed by the agency in the *Pole Attachments Order*. Furthermore, when the case was decided, Section 224 had never been held to apply to any facilities in or on privately-owned buildings, and the Commission had opened the *Competitive Networks* proceeding to address that very question, which remains unresolved, pending reconsideration. Federal Petitioners cannot now rely on a *post hoc* rationalization of counsel, and the *Pole Attachments Order* cannot be affirmed on a rationale that the Commission did not recite in that *Order*.

ARGUMENT

I. SECTION 224 IS A LIMITED GRANT OF AUTHORITY, WHICH MUST BE CONSTRUED NARROWLY.

The Court should reject a broad reading of Section 224 because the statute is a measured attempt by Congress to deal with a discrete problem.

The AEPSC Brief ably describes the background to the enactment of Section 224 and its subsequent amendment by the Telecommunications Act of 1996. AEPSC'S recitation of Congress's incremental approach demonstrates several important points:

1. The mere fact that certain facilities might be useful in the provision of telecommunications services is not enough to give the Commission the power to regulate either such facilities or their owners. The Commission itself recognized this in *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977), and Congress concurred when it enacted Section 224. S. Rep. No. 95-580, at 14 (1977), reprinted in 1978 U.S.C.A.A.N. 109, 122 ("*Senate Report*").

2. From the previous point it follows that the Commission has no authority over entities that are not engaged directly in the provision of telecommunications services or some other aspect of the communications industry, such as broadcasting. The Commission may only regulate the persons and matters addressed in the Communications Act and has no authority over the real estate industry. *See Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120

(1945); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1992).

3. It also follows that the Commission's ancillary jurisdiction does not extend to persons engaged in other lines of business, such as the generation and transmission of electricity. Otherwise, there would be no limit to the types of entities subject to the Communications Commission's powers, and Section 224 would not have been necessary. *See Illinois Citizens Committee*, 467 F.2d at 1400. For example, the Commission does not have the power to direct automobile manufacturers to install cellular telephones in every vehicle they make, or to modify their design specifications to conform to the wishes of the telecommunications industry.

4. Congress recognized that allowing the Commission to regulate pole attachments might inadvertently raise additional issues, and Congress consequently strictly limited the scope of the new grant contained in Section 224. Congress desired to promote the growth of the cable television industry, and therefore wanted to ensure that cable operators were not prevented from using existing wireholding facilities, but that was all. The statute thus was carefully drafted to achieve two specific, narrow goals: establishing a mechanism for reviewing pole attachment practices, and protecting the cable television industry from unreasonable or unjust pole attachment practices. *Senate Report* at 14, 1978 U.S.C.A.A.N. at 127. The Commission's new authority was "strictly circumscribed" in various ways. First, the burdens of the statute were placed only on telephone companies, electric companies, and other utilities that make pole space available

to cable companies. *Id.* at 15-16, 1978 U.S.C.A.A.N. at 123-24: Second, the only property to be affected was space "that has been designated and is actually being used for communications services by wire or cable." *Id.* at 15, 1978 U.S.C.A.A.N. at 123. Third, the Commission was only permitted "to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." *Id.* The Commission was not to concern itself with regulating "access and charges for use of public and private roads and rights-of-ways essential for the laying of wire," "access and rents for antenna sites," "problems pertaining to restrictive easements of utility poles and wires over private property," "exercise of rights of eminent domain," "assignability of easements" or "other acquisition of rights-of-way." *Id.* at 16, 1978 U.S.C.A.A.N. at 124. Finally, neither the statute nor the legislative history express any intent to regulate the installation of cable television or other wireline facilities inside buildings. The emphasis is almost entirely on poles, with some brief discussion of ducts and conduits (which are described in the legislative history as "underground reinforced passages").[11]

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[11] *Id.* at 26, 1978 U.S.C.A.A.N. at 134. The title of Section 224 itself indicates that Congress was primarily concerned with attachments to poles. Indeed, the legislative history noted that 95% of the plant in question consisted of poles, with the rest underground. *Id.* at 12, 1978 U.S.C.A.A.N. at 120. In other words, the problem being addressed by Congress had to do with outside plant. The references to ducts and conduits were needed to address those cases in which plant was installed underground, and the reference to rights-of-way was needed to ensure the cable companies

5. The 1996 amendments to Section 224 extended the benefits of the statute to telecommunications providers (other than incumbent local exchange carriers), but did nothing to alter the types of facilities subject to the burdens of the statute.

Despite this complete lack of Congressional intent to subject property owners to Commission regulation, the Real Estate *Amici* have been forced to devote over two years and considerable expense to fending off just that threat. Nevertheless, the Real Estate *Amici* believe that the Commission's interpretation of Section 224 as applying to pathways inside buildings was incorrect and unjustified, and the threat of future extension of that ruling remains.

Indeed, the *Competitive Networks Order* already creates the possibility that the Commission's extension of Section 224 to pathways inside buildings creates a *per se* taking under the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable attachment to apartment building held to be a taking). That is one reason the Alliance has sought reconsideration. And the Commission has yet to rule on the question of whether Section 224 allows telecommunications providers access not just to defined utility pathways, but to any part of a building. Such a ruling would clearly raise Fifth Amendment concerns. The Wireless *Amici* argue that a fixed wireless carrier "must install wires through a building that connect its rooftop wireless antenna to its in-building customer ...." Wireless Brief at 16. Any de-

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had the right to enter the real estate on which the poles, ducts and conduits were located.

cision by the Court that adopts such a factual basis, or a legal theory dependent on it, will raise the same Fifth Amendment issues that are currently before the Commission. Accordingly, the Court should construe Section 224 narrowly and reject that theory entirely.

II. SECTION 224 DOES NOT APPLY TO ATTACHMENTS OF WIRELESS FACILITIES.

The Court of Appeals properly held that Section 224 does not confer benefits on persons seeking to attach wireless facilities. Neither the text of the statute nor the legislative history support any other conclusion: as the Court of Appeals noted, the policy underlying Section 224 was a desire to prevent utilities from charging monopoly rents for the use of their "bottleneck" facilities. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1274 (11th Cir. 2000), *reh'g en banc denied*, 226 F.3d 1120 (11th Cir. 2000) *cert. granted*, 121 S. Ct. 879 (2001). Because wireless equipment can be located on buildings, antenna towers, streetlight stanchions, and numerous other places, utility poles are not bottleneck facilities for wireless equipment. Indeed, one of the chief advantages of wireless technology is that it is not dependent on connected, linear rights-of-way, and can be installed in many more places than wireline equipment. Therefore, users of wireless equipment do not need the assistance provided by Section 224. They might like it; they might want it; they might benefit from it greatly. But from the beginning Section 224 was to be a minimal grant of

power, and a minimal intrusion on the rights of utilities. Accordingly, it should not be expanded without a clear directive from Congress.

Both the Federal Petitioners and the Wireless *Amici* object to the Eleventh Circuit's use of the term "bottleneck facilities," on the grounds that it does not appear in the text of Section 224. Federal Petitioners' Brief at 34; Wireless Brief at 11. This is meaningless, of course, since the underlying policy is clear. And we note that the word "wireless" never appears in Section 224, either. The Federal Petitioners and the Wireless *Amici* argue that because the definition of "pole attachment" includes attachments by "provider[s] of telecommunications services," and because wireless carriers provide telecommunications services, they are entitled to the benefits of Section 224. This is true. But the real issue is not whether Section 224 applies to wireless carriers, but for what purpose any carrier is entitled to rely on Section 224. The definition of "pole attachment" does not address that question, much less answer it. The answer lies in the definition of "utility," which specifically refers to poles and other facilities used "for wire communications," 47 U.S.C. § 224(a)(1), and the definition of "usable space," which refers to "wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). These are the only two places in the statute that describe the *type* of equipment that may be attached, and neither refers to wireless facilities.

The Federal Petitioners counter this argument by saying that once a pole or other facility comes under the Commission's jurisdiction for one purpose, the Commission can regulate that facility in any way it

sees fit. Federal Petitioners' Brief at 33. Therefore, according to the Government, even if Congress meant for the authority to regulate attachments to apply only to wireline equipment, the Commission can extend that authority because the definition of "pole attachment" in Section 224(a)(4) does not expressly exclude wireless equipment. This might be a good argument if it were not clear that Congress never even thought about wireless attachments; the entire purpose of the statute was to deal with wireline attachments. The Government tries to duck that point by claiming that Congress's policy concerns are essentially irrelevant: If the statutory language can be read as giving the Commission more power than Congress intended, then the Commission can exercise that power. Federal Petitioners' Brief at 33-34. But Congress cannot inadvertently delegate its authority. It is a fundamental principle that a statute must be read in light of the intent of Congress in enacting the statute, and the policy being addressed by the statute defines that intent.

The Commission therefore is not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statute must be interpreted in a fashion that considers the underlying policy in discerning the meaning of the literal words.[12] As the Court stated in *Dunn v.*

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[12] As further discussed *infra*, the *Pole Attachments Order* does not state that it applies to fixed wireless providers, or that they have siting needs different from those of mobile wireless companies. *Chevron* deference is not due "where an agency itself has articulated no position on [a] question." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

Commodity Futures Trading Commission, 519 U.S. 465, 478 (1997), "[w]hile that may not be the only possible reading of the literal text ... our interpretation is faithful to the 'contemporary legal context' in which the [statute] was drafted." In that case, the Court held that the agency was not entitled to *Chevron* deference because in reading the statute as a whole and considering the evolution of Congress's policy goals it was evident that a broader reading was required. In this case, the reading given Section 224 by the Court of Appeals is consistent with the limited grant of power Congress made to allow the Commission to regulate entities otherwise outside its jurisdiction, and with the fact that the relevant portions of the statute were specifically not amended as part of the broad overhaul of the 1996 Act.

Finally, the Wireless *Amici* stress that Congress meant for the Communications Act to be applied in a nondiscriminatory manner. Wireless Brief at 11. This is a broad overstatement, and ultimately unavailing. There is generally little Congress can do to alter the fundamental differences between technologies. Each has its advantages and disadvantages, largely dictated by the laws of physics. The law simply cannot account for all of these differences, and neither the Commission nor the Court should presume that Congress meant to do so without pointing to a specific statutory provision. In this case, there is no question that Congress was originally concerned about the attachment of wireline facilities to wireholding facilities, and the 1996 Act did not alter the relevant language in Section 224. Broad policy statements favoring nondiscrimina-

tion do not trump the specific policy embedded in the strict language of the statute.

III. THE COURT OF APPEALS SHOULD BE UPHELD BECAUSE THE FEDERAL PETITIONERS AND THE WIRELESS AMICI RELY ON FACTS INTRODUCED AND POLICIES ADDRESSED NOT IN THE ORDER UNDER REVIEW, BUT IN A COLLATERAL PROCEEDING.

Both the Commission and the Wireless *Amici* argue that the Court of Appeals incorrectly assumed that wireless equipment can be attached to a broad range of structures, apparently -- according to the Commission and the Wireless *Amici* -- failing to recognize that fixed wireless providers may require access to a particular location (such as a rooftop or other site that gives them access to a particular building) to serve customers at that location. Wireless Brief at 15; Federal Petitioners' Brief at note 12. This argument must be rejected. Not only was the Eleventh Circuit's decision proper based on the record before it, but the Federal Petitioners and the Wireless *Amici* are attempting to introduce for the first time findings from a collateral proceeding. This effort violates the rule of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

The Commission's *Pole Attachments Order* never distinguishes between different types of wireless providers. The only description of wireless providers in the *Order* is the statement that "cellular telephone, mobile radio, and PCS are telecommunications serv-

ices." 13 FCC Rcd 6777 at ¶ 40. Those services are all mobile services, which do not depend strictly on connections to specific locations or poles. The *Pole Attachments Order* goes on to describe the type of equipment involved as "an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Id.* at ¶ 41. This is an accurate description of the equipment typically used by a cellular or PCS operator, and there is nothing in the *Pole Attachments Order* that would indicate that the Commission intended Section 224 to apply more broadly than to providers operating the types of equipment referred to in the Eleventh Circuit's decision. The *Pole Attachments Order* does not acknowledge the existence of fixed wireless providers, much less that they have different siting requirements than other wireless providers. Consequently, the Court of Appeals was entirely justified in its conclusion about the types of facilities to which the Commission was seeking to give access.

More fundamentally, this argument presumes that Section 224 applies to privately-owned buildings and facilities inside such buildings, because unlike mobile wireless companies, fixed wireless providers seek access to the sites at which their customers are located. But that point was not addressed in the *Pole Attachments Order* and was not briefed before the Court of Appeals. Indeed, the Commission only ruled to that effect in the *Competitive Networks Order*, six months after the Eleventh Circuit's decision.

The Federal Petitioners and the Wireless *Amici* simply ignore this issue.[13] But the Government cannot rely on facts found in a collateral proceeding to justify the *Pole Attachments Order*. The *Pole Attachments Order* is entirely silent on the siting needs of fixed wireless providers, and as noted *supra* the scope of its discussion appears to limit the issue to mobile providers. "Not having discussed the possibility, the agency submitted no reasons at all." *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 49-50 (1983). An agency order may not be affirmed on a rationale not relied on by the agency in its order. The arguments of the *Federal Petitioners* and the Wireless *Amici* are impermissible, *post hoc* rationalizations of counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962). This effort also violates the Administrative Procedure Act,

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[13] Federal Petitioners cite certain statements in the *Competitive Networks NPRM*, which issued in June 1999, but do not refer to the October 2000 *Competitive Networks Order*. Federal Petitioner's Brief at n.12. The Wireless *Amici* cite the *Competitive Networks Order*, but fail to show that the facts for which they cite that order were part of the record in the February 1998 *Pole Attachments Order*. Wireless Brief at 15-16. In any case, although the wireless industry may have made that argument, it also appears that the Commission implicitly rejected it at the time. Not only does the *Pole Attachments Order* fail to discuss Wireless *Amici's* interpretation of Section 224, but the Commission's decision to seek comment on the issue in the *Competitive Networks NPRM* the following year indicates that the Commission knew it did not have an adequate record in the *Pole Attachments* proceeding to support that reading of Section 224.

5 U.S.C. § 553, because the *Pole Attachments NPRM* did not give fair notice that the application of Section 224 to in-building pathways would emerge on appeal.

This case is not the proper forum for addressing the application of Section 224 inside buildings because of its enormous ramifications for the real estate industry, and because the Commission has been asked to reconsider the *Competitive Networks Order*. The decision of the Court of Appeals was correctly based on the record before it, and it should be upheld.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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